84-93
No. _____

Office-Supreme Court, U.S.
FILED
JUL 16 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MARTIN ALLEN FINE,

Petitioner,

v.

BARRY AND ENRIGHT PRODUCTIONS,
GOODSON-TODMAN PRODUCTIONS,
MERRILL HEATTER PRODUCTIONS, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
MERV GRIFFIN PRODUCTIONS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

Martin Allen Fine
4346 Redwood Ave. #109
Marina del Rey, Ca. 90292
Telephone: (213) 827-2143
Petitioner in Propia Persona

74pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a per se rule or a rule of reason analysis is to be applied when a concerted refusal to deal is vertical rather than horizontal?

2. Whether respondents' practices violate the Sherman Act when analyzed under the Rule of Reason?

3. Whether the Rule of Reason can dispose of an anti-trust action where reasonableness is at issue?

4. Whether the practices of the respondents in the instant case constitute a group boycott?

5. Whether conscious parallel action combined with various plus factors is sufficient to establish a conspiracy?

6. Whether summary judgment may be granted when there are genuine issues as to the existence of a conspiracy?

7. Whether petitioner made a good showing of an anti-competitive effect caused by the respondents' practices?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW. . . .	i
OPINIONS BELOW.	2
JURISDICTION.	3
STATUTUE INVOLVED.	3
STATEMENT OF THE CASE.	3
REASONS FOR GRANTING THE WRIT. . . .	8
CONCLUSION.	25
APPENDIX A: Opinion of United States Court of Appeals for the Ninth Circuit of April 25, 1984.	A1
APPENDIX B: Statement of Reasons of United States District Court of May 11, 1983.	B1
APPENDIX C: Judgment of United States District Court of May 11, 1983.	C1
APPENDIX D: Order of Ninth Circuit Court of Appeals denying petition for	

TABLE OF CONTENTS (cont.)

Page

rehearing of June 22, 1984. . . . . D1

APPENDIX E: Filing and Spreading Mandate from the Ninth Circuit Court of Appeals of July 6, 1984. . . . . E1

TABLE OF AUTHORITIES

	Page
Cascade Cabinet Co. v. Western Cabinet and Millwork, 710 F.2d 1366 (9thCir.1983).	10,16
Denver Rockets v. All-Pro Management, Inc., 325 F.Supp 1049 (C.D.Cal.1971).	9,18
Dr. Miles Medical Co. v. John D. Park & Sons, Co., 220 U.S. 373 (1911).	15
Fashion Originators' Guild of America v. F.T.C., 312 U.S. 668, 61 S.Ct.703 (1941).	12
Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939).	15
Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct.705 (1959).	8,12,13, 16,18
National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. ____ June 27, 1984.	19,20,22
No. Pac. Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 518 (1958).	11
Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc., 394 U.S. 700 (1968).	13

TABLE OF AUTHORITIES (cont.)

Page

Poller v. Columbia Broadcasting Co., 368 U.S. 464 (1962) 14

St. Paul Fire and Marine Ins. Co. v. Barry, 438 U.S. 531 (1977) 13

Theater Enterprise Inc. v. Paramount Film Distrib Corp., 346 U.S. 537 (1959) 15

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. _____

MARTIN ALLEN FINE,

PETITIONER,

v.

BARRY AND ENRIGHT PRODUCTIONS,
GOODSON-TODMAN PRODUCTIONS,
MERRILL HEATTER PRODUCTIONS, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC.,
MERV GRIFFIN PRODUCTIONS,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Martin Allen Fine, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on April 25, 1984.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 25, 1984. A copy of the opinion is attached as Appendix A.

The judgment of the United States District Court, Central District of California, was entered on May 12, 1983. A copy of the Statement of Reasons is attached as Appendix B. A copy of the Judgment is attached as Appendix C.

The United States Court of Appeals for the Ninth Circuit denied petitioner's petition for rehearing and suggestion of rehearing en banc on June 22, 1984. A copy of the order is attached as Appendix D.

The mandate from the United States Court of Appeals for the Ninth Circuit was filed and spread by the United States District Court, Central District of California, on July 6, 1984. A copy of the mandate is attached as Appendix E.

JURISDICTION

On April 25, 1984 the United States Court of Appeals for the Ninth Circuit entered judgment affirming the granting of respondents' motion for summary judgment. On June 22, 1984 the United States Court of Appeals for the Ninth Circuit denied petitioner's petition for rehearing and suggestion of rehearing en banc. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1).

STATUTUE INVOLVED

Sherman Act, 15 USCS §1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.

STATEMENT OF THE CASE

On February 10, 1982, petitioner Martin Allen Fine filed a complaint in the

United States District Court, Central District of California, alleging violation of Section 1 of the Sherman Act. The District Court had jurisdiction of this cause of action under the provisions of the Sherman and Clayton Acts, specifically Title 15 USCS §1 and 15.

On May 12, 1983, the District Court granted respondents' motion for summary judgment and denied petitioner's motion for partial summary judgment, holding that petitioner lacked standing to sue under the anti-trust laws.

On April 25, 1984, a panel of the Ninth Circuit Court of Appeals affirmed the District Court's granting of summary judgment in favor of the respondents, though on different grounds than that relied upon by the District Court. The Ninth Circuit Court of Appeals reversed the District Court's finding with respect to the standing issue and held that petitioner was injured in his business and

consequently had standing to sue under the anti-trust laws. However, the Ninth Circuit held that, in applying a rule of reason analysis to the instant case, there were valid reasons for the eligibility rule, contained in the contracts between the game show producer and the television network broadcasting each respective game show, which restricts the number of times a contestant may compete on game shows.

A timely petition for rehearing pursuant to Rule 35(d) and 40 of the Federal Rules of Appellate Procedure was filed May 3, 1984 and the petition was denied on June 22, 1984.

The basic facts material to the consideration of the questions presented are as follows:

Petitioner Martin Allen Fine competed on three network televised game shows, winning $5,393 in cash and prizes on Tic Tac Dough in 1978, $5,682.85 in cash and prizes on Password Plus in 1980, and

$211.45 in prizes on Blockbusters.

Fine was selected as a contestant for the game show Joker's Wild and brought to the studio for a taping of the show on January 26, 1982, only to be subsequently disqualified from competing on the show due to an eligibility rule contained in the contract between the producer of the show, respondent Barry and Enright Productions, and the network broadcasting the show, respondent CBS Inc. Petitioner was also informed by the production companies of other network televised game shows that he was ineligible to compete on their respective game shows due to the eligibility rule restricting the number of times a contestant may compete on game shows.

Due to petitioner Fine's prior game show appearances, the respondents named in this action have excluded Fine from competing on any network televised game show (or any game show broadcast over a

network owned and operated television station) through agreements which require the game show production company to comply with the network's eligibility rule restricting the number of game shows a contestant may compete on.

The eligibility rule agreed upon between any network and any production company producing a game show for broadcast on that network or for the network's owned and operated station states that in order to be eligible to compete on a game show, a contestant must not have been on any other game show within the immediately preceding twelve month period. Additionally, NBC and the production company producing a game show for broadcast on the NBC network or NBC owned and operated stations have agreed that to be eligible a contestant must not have been on more than two other game in a lifetime. CBS and the production company producing a

game show for broadcast on the CBS network or CBS owned and operated stations have agreed that to be eligible a contestant must not have been on more than two other game shows in a lifetime. ABC and the production company producing a game show for broadcast on the ABC network or ABC owned and operated stations have agreed that to eligible a contestant must not have been on two game shows in the immediately preceding five year period.

REASONS FOR GRANTING THE WRIT

The Federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court and has also decided a federal question in a way in conflict with applicable decisions of this Court.

In Klors v. Broadway-Hale Stores, Inc., 359 U.S.207, 79 S.Ct.705 (1959), this Court established the rule that "group boycotts are per se violations of the Sherman Act," and nothing since that

case qualifies this rule.

It is undisputed that the game shows petitioner has been excluded from competing on are broadcast over the public airwaves in the various states. It is also undisputed that for every network televised game show, the agreements between the respective producer and network contain an eligibility rule that excludes the petitioner and others similarly situated from competing on network televised game shows. Though the facts of the instant case meet the test for a group boycott as fashioned by the District Court in Denver Rockets v. All-Pro Management, Inc., 325 F.Supp 1049 (C.D.Cal.1971), the Court of Appeals in the instant case held that "even though a boycott can, and often does, span more than a single level, some concerted effort at a single market level--a horizontal combination or agreement--is requisite before the type of per se violation commonly termed a 'group boycott' can be found to exist." The Court of

Appeals in the instant case concludes that "the agreements between the networks and the producers which Fine alleges violate Section 1 are vertical," and that "a per se rule is generally not applied when a concerted refusal to deal is vertical rather than horizontal."

Thus, the Court of Appeals in the instant case has carved out a new exception to this Court's long standing rule that group boycotts are per se violations of the Sherman Act, for this Court has never distinguished between vertical and horizontal group boycotts. Furthermore, the Ninth Circuit in the instant case has overlooked its own exception to the Ninth Circuit fashioned rule that vertical concert of activity is not per se unreasonable.

In Cascade Cabinet Co. v. Western Cabinet and Millwork, 710 F.2d 1366 (9thCir.1983), the Ninth Circuit Court of Appeals first carved out an exception and stated that if the practice appears to be

one that would almost always tend to restrict competition, then the per se rule may be applied;and the instant case fits into this exception. The instant case can be easily distinguished from the Cascade decision where it was held that the exception did not apply because while Cascade was able to enter the market, petitioner Fine and others similarly situated have been totally excluded from game show competition on CBS and NBC network televised game shows for the rest of their lives. This is clearly the type of "pernicious effect on competition" described by this Court in No. Pac. Ry. Co. v. United States, 356 U.S.1,5, 78 S.Ct. 514,518 (1958) which justifies implementation of the per se rule, for the eligibility rules in the instant case will always and forever deprive certain previous contestants from competing on game shows.

This Court has long held that agreements at any level designed to exclude

others from competition are per se illegal. In Klors, Inc. v. Broadway-Hale Stores, Inc., supra., this Court found a combination of manufacturers, distributors and a retailer to deprive another retailer of the opportunity to buy certain appliances to be per se illegal. In Fashion Originators' Guild of America v. F.T.C., 312 U.S.668, 61 S.Ct.703 (1941), this Court found an agreement by garment designers and manufacturers not to sell to retailers to be per se illegal. Thus, this Court has in the past found vertical combinations or agreements, wherein actors at one level of a trade pattern refuse to deal with actors at another level, to be per se illegal without distinguishing the vertical nature of the concerted activity from a horizontal one.

Moreover, it is of no consequence, though so suggested in a concurring opinion in the instant case, that petitioner is not a competitor of the respondents,

for in St. Paul Fire and Marine Ins. Co. v. Barry, 438 U.S.531,552 (1977), this Court stated that: "We hold the term 'boycott' is not limited to concerted activity...against competitors or members of the boycotting group." Additionally, though the Ninth Circuit Court of Appeals in the instant case upheld the concerted eligibility rules as being reasonable, this Court has long held that group boycotts "have not been saved by allegations that they were reasonable in the specific circumstances..." Klors, Inc. v. Broadway-Hale Stores, Inc., supra., p.212.

However, even assuming arguendo that the rule of reason analysis was the appropriate approach rather than the per se rule for adjudicating this controversy, summary judgment in favor of the respondents should not have been affirmed by the Court of Appeals.

This Court in Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,

394 U.S.700 (1968) held that summary judgment is inappropriate where there are issues of reasonableness to be judged by the Rule of Reason because reasonableness is a paradigm fact question. Similarly, this Court in Poller v. Columbia Broadcasting Co., 368 U.S.464 (1962) struck down the use of summary judgment in a Rule of Reason case since motive and intent are important elements in making out a case and the bulk of determinative evidence is controlled by the defendant.

In the instant case, the Ninth Circuit Court of Appeals affirmed summary judgment in favor of the respondents by holding as a matter of law that the concerted eligibility restrictions of the respondents are reasonable, yet petitioner made a good showing and presented considerable evidence to support the conclusion that the eligibility restrictions are unreasonable. Therefore, contrary to the holding of the Ninth Circuit in this matter, there are

material issues of fact which have a bearing on a Rule of Reason analysis, and thus according to Fed. R. Civ. P. 56 (c), summary judgment as a matter of law was inappropriate under the circumstances.

Similarly, lower courts have denied summary judgment motions in cases where conspiracy is an issue, and though the Court of Appeals in the instant case found no conspiracy present, petitioner presented considerable evidence to support the contrary conclusion, thus raising material issues of fact. Though the Court of Appeals in the instant case states in its opinion that conscious parallel action alone is insufficient to establish a conspiracy, petitioner specifically presented evidence of various plus factors, and this Court in such cases as Interstate Circuit, Inc. v. United States, 306 U.S.208 (1939), Dr. Miles Medical C. v. John D. Park & Sons, Co., 220 U.S. 373 (1911), Theater Enterprises Inc. v. Paramount Film Distrib,

Corp., 346 U.D.537 (1959), has held that where there is conscious parallel activity supported by plus factors, there is sufficient evidence to establish the existence of a conspiracy. Yet, the Court of Appeals in the instant case did not consider the overwhelming evidence of plus factors in its determination that there was no horizontal conspiracy between the networks and/or between the producers.

With respect to petitioner showing a general anti-competitive effect caused by the respondents' restrictive eligibility rules, this Court since Klors, Inc. v. Broadway-Hale Stores, Inc., supra., has held that conduct such as the respondents' in the instant case falls within a catagory to which the per se rule applies and in which it is not necessary to show actual anti-competitive effect for such effect is presumed.

Even by the standard set out by the Ninth Circuit in Cascade Cabinet Co. v.

Western Cabinet and Millwork, supra., respondents' conduct satisfies the test for falling into one of the per se categories because it is undisputed that respondents intentionally engaged in conduct, i.e. the contractual eligibility rules, which always adversely affect competition among game show contestants in that the rules always exclude contestants who have previously competed on a certain number of shows. Unlike the Cascade case where Timberland made competition difficult for Cascade, the respondents in the instant case have made competition impossible for the petitioner and others similarly situated.

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) stands for the proposition that the freedom to compete must be guaranteed to every entity, no matter how small or insignificant that person's economic interests may be and that implicit in such freedom to compete is the notion that it cannot be foreclosed

because certain groups believe that such foreclosure might promote greater competition.

Klors, Inc. v. Broadway-Hale Stores, Inc., supra., stands for the proposition that a refusal to deal is not to be tolerated merely because the victim is one small entity.

Additionally, as pointed out by the District Court in Denver Rockets v. All-Pro Management, Inc., supra., there is an especially harmful anti-competitive effect where, as is the case with the respondent television networks, the members of a combination possess market power in a degree approaching a shared monopoly. The very existence of the agreements which require the game show producer to comply with the network's eligibility policy in order to produce a game show for that respective network is compelling evidence of the respondent networks' great market power.

In its opinion, the Court of Appeals in the instant case states that "even assuming the requisite anti-competitive effect, we lack the experience with this sort of business relationship which would justify creating a new per se classification." For this additional reason, it would appear imperative that this Court review the sort of business relationship found in the instant case and determine if per se illegal practices exist.

Furthermore, since the time that the Ninth Circuit Court of Appeals reached its decision in the instant case, this Court has decided the case of National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S.___, June 27, 1984, and the Ninth Circuit was unable to consider this recent Supreme Court ruling in its adjudication of the instant controversy. In this above-mentioned recent Supreme Court ruling, this Court found that the contracts between the

NCAA and the networks represented a group boycott and that it unjustifiably limited the number of network televised football games that universities could compete on. In this recent case, this Court stated that the anti-competitive consequences of this arrangement are apparent in that individual competitors lose their freedom to compete. The same thing can be said for the arrangement in the instant cause of action.

Of crucial importance to the adjudication of the instant case was the conclusion reached by the Ninth Circuit Court of Appeals that under a Rule of Reason analysis, the practices of the respondents were reasonable. However, this Court in using a rule of reason analysis in the aforementioned NCAA case found the arrangement between the NCAA and the networks to be unreasonable; and since this Court's ruling in the NCAA case followed the decision of the Ninth Circuit in the instant case, the Court of Appeals was

unable to apply the reasoning and findings of this Court to its determination of the instant case.

There are indeed close similarities between the arguments raised by the NCAA in the recent Supreme Court case and those raised by the respondent networks and producers in the instant case. The NCAA's defense to its plan was that 1950's studies showed that live attendance would suffer, but this Court found that there was no evidence to support that theory in today's market. This defense is similar to the respondents' defense that because of the 1950's game show scandals, the eligibility rule was formulated. Similarly, this argument is not applicable today because of the various other safeguards taken by the respondents to insure the integrity of their game shows.

This Court also found that the NCAA argument that its plan was necessary to protect live attendance was not based on

a desire to maintain the integrity of college football but rather on a fear that its product would not prove sufficiently attractive to draw live attendance from the televised games. This reasoning can be readily applied to a similar situation in the instant case where the respondents' professed desire to protect game show integrity is really based on a fear that the product in absence of the eligibility restrictions would not prove sufficiently attractive in order to garner the type of ratings the respondents seek.

Just as this Court found the NCAA's justification inconsistent with the basic policy of the Sherman Act, the respondents' justifications are similarly inconsistent with the Sherman Act's policy. As this Court states in this recent NCAA case: "The Rule of Reason does not support a deense based on the assumption that competition itself is unreasonable."

Just as this Court held that the NCAA's interest in maintaining a competitive balance among amateur athletic teams did not justify its regulations, this Court must similarly find that the respondent network and producers' interest in maintaining a competitive balance among game show contestants does not justify its eligibility rules which restrict the number of times a contestant may compete on game shows. Therefore, even if a rule of reason analysis is to be used to adjudicate the instant case rather than the per se rule, the respondents' practices violate the policy of Section 1 of the Sherman Act.

Just as the NCAA cannot be allowed to be lord of the manor over the networks and exclude universities from appearing on a certain number of network televised football games, the networks cannot be allowed to be the lord of the manor over the game show producers and exclude game show contestants from appearing on a

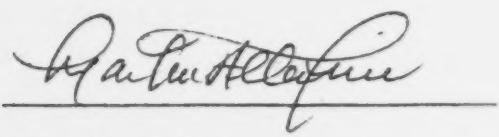
certain number of network televised game shows.

The game show marketplace has provided the petitioner with an opportunity to earn income by competing as a game show contestant; and due to the respondents' contractual eligibility policies, petitioner and other contestants similarly situated have been denied access to this income producing marketplace. The function of the anti-trust laws is to guarantee each entity seeking access to the marketplace, no matter how small, the freedom to compete; and since the game show contestant competes for cash and prizes and so earns taxable income, he deserves the freedom to assert with ingenuity and enthusiasm whatever income earning muscle he can muster. The anti-trust laws were meant to protect such an imaginative exercise of free enterprise.

CONCLUSION

For the foregoing reasons, petitioner Martin Allen Fine respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



DATED:

July 12, 1984

Martin Allen Fine
4346 Redwood Ave. #109
Marina Del Rey, Ca. 90292

Telephone (213) 827-2143

Petitioner in Propia
Persona

Do not copy

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN ALLEN FINE, Plaintiff-Appellant, v. BARRY AND ENRIGHT PRODUCTIONS, GOODSON-TODMAN PRODUCTIONS, MERRILL HEATTER PRODUCTIONS, INCORPORATED, NATIONAL BROADCASTING COMPANY, INCORPORATED, AMERICAN BROADCASTING COMPANIES, CBS, INCORPRATED, MERV GRIFFIN PRODUCTIONS, Defendants-Appellees.	No. 83-5899 D.C. No. CV 82-0628 LTL O P I N I O N

Appeal from the United States District Court for the Central District of California

Hon. Lawrence T. Lydick, District Judge, Presiding

Argued and Submitted -- January 3, 1984
Decided -- April 25, 1984

Before: SNEED, KENNEDY, and BOOCHEVER, Circuit Judges.

BOOCHEVER, Circuit Judge:

Fine appeals from a summary judgement dismissing his antitrust claim for lack of standing under sections 4 and 16 of the Clayton Act, 15 U.S.C. Sections 15, 26. He alleges that agreements between game show pro-

ducers and television networks limiting the number of game show apperances by non-celebrity guests violate section 1 of the Sherman Act, 15 U.S.C. Section 1. We hold that Fine has standing to pursue his claim, but affirm the district court's dismissal based on a rule of reason analysis.

FACTS

Fine applied to appear on six game shows over a four-year period. In July 1978, he competed on "Tic Tac Dough," winning $5,393 in cash and prizes. In May 1980, he applied to be on "Bulls Eye," but was not selected. In November 1980, he appeared on "Password Plus" and won $5,682.85 in cash and prizes. In January 1982, he competed on "Blockbusters" and received $211.45 in prizes. That same month Fine applied to become a contestant on "Joker's Wild." His application was accepted and he was invited to return to the studio for taping. When the show's producrrs learned of his previous game show appearances, however, they disqualified him. In February 1982, Fine applied

to appear on "Battlestas," but was not chosen.

During this period, Fine was a law student at Pepperdine University and held several part-time jobs as a waiter, municipal court clerk , agent-trainee, and salesman. Between 1978 and 1982 Fines' taxable income was $15, 494.34, of which $8,517.85 represented game show winnings.

The three network defendants have different standards on non-celebrity game show appearances. The networks have agreements with their respective game show producers requiring compliance with these standards. NBC limits contestants to three game shows in a lifetime. ABC will not accept contestants who have appeared on a game show once in the past twelve months or twice within the past five years. CBS eliminates applicants who have been on one game show in the past twelve months or on two game shows in lifetime.

Two of the producers have their own standards on non-celebrity appearances. Barry and Enright Productions limits contestants to one

show within the past twelve months or not more than two shows within the past ten years. Merrill Heatter Productions requires contestants to agree not to appear on any other game show in the ninety days following an appearance on a Merrill Heatter game show.

The district court granted summary judgment for the defendants, ruling that Fine did not have standing because he had not alleged injury to his "business" or "property" as required by section 4 of the Clayton Act. The court denied standing for section 16 injunctive relief based on a finding that Fine failed to demonstrate a significant threat of future injury.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our task is identical to that of the trial court. State ex rel. Edwards v. Heimann, 633 F.2d 886, 888 n.1 (9th Cir. 1980). Viewing the evidence in the light most favorable to the party against whom summary judgment was granted, we must determine whether the trial court

correctly found that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. Chelson v. Oregonian Pub. Co., No. 82-3201, slip op. at 4433 (9ht Cir. Nov. 16, 1983). "We may affirm summary judgment on any ground appearing on the record whether or not the district court relied on it." Bernard v. City of Palo Alto, 699 F.2d 1023, 1024 n.1 (9th Cir. 1983) (per curiam).

DISCUSSION

A. Standing

Section 4 of the Clayton Act allows recovery of treble damages by "(any) person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. Section 15. The lack restrictive language in section 4 reflects an expansive remedial purpose and an intent to protect all who are made victims of forbidden practices. See Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982).

The district court acknowledged, and we agree, that, in the absence of the restrictive

policies challenged by Fine, there is no reason why a person could not make a business out of being a game show contestant. The word business "includes that which occupies the time, attention, and labor of men for the purpose of ...pecuniary reward." Roseland v. Phister Mfg. Co., 125 F.2d 417, 419 (7thCir. 1942); see also Hawaii v. Standard Oil Co., 405 U.S. 251,264 (1972) ("words 'business or property' ...refer to commercial interests or enterprises"). Merely because defendants are not obligated to accept particular applicants as contestants, does not mean that one could not engage in contests as a business. Defendants' arguments that a non-celebrity could not successfully engage in contests as a business are based largely upon the very restrictions on repeat appearances which Fine challenges.

The district court found that Fine as an individual had not engaged in game show participation as a business and therefore lacked section 4 standing. Although the issue is close, we believe that Fine has raised a triable issue of fact.[1]

Section 4 grants standing to prospective entrants to a business as well as to existing industry members if a prospective entrant has "taken substantial demonstrable steps to enter an industry" and has been "thwarted on that purpose by anti-trust violations." Solinger v. A & M Records, Inc.,586 F2d 1304, 1309 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). This circuit has endorsed a four factor "intention and preparedness" test under which we consider:

> 1. The background and experience of plaintiff in his prospective business . . .
> 2. Affirmative action on the part of plaintiff to engage on the proposed business . . .
> 3. The ability of plaintiff to finance the business and the purchase of equipment and facilities necessary to engage in the business . . .
> 4. The consummation of contracts by plaintiff . . .

Id. at 1309-10, quoting Waldron v. British Petroleum Co., Ltd., 231 F. Supp. 72, 81-82 (S.D.N.Y. 1964); see also Parks v. Watson, 716 F.2d 646, 660 (9th Cir. 1983)(per curiam) (setting out the factors). Regardless of the distinction between an existing and a pros-

pective enterprise we find the four factor analysis useful in considering the issue of Fine's standing.

Fine has made six attempts to compete in four years and has been successful on three occasions. In the context of game show participation this constitutes significant "background and experience" and also demonstrates "affirmative action" on his part to make a business out of contest appearances. "Ability to finance" is not a relevant factor, as contest participation is labor intensive. Fine's actual participation on three occaisions is equivalent to "consumation of contracts".

We do not, as did the district court, believe Fine's status as a law student, engagement in part-time employment and failure to make special efforts to improve contest skills mandate the conclusion that he was not engaged in or attempting to engage in business for purposes of section 4. A business can be conducted on a part-time basis. In the absence of the challenged restrictions, Fine might well have spent more time as a contestant and

less time in other, less renumerative part-time employment. His earnings from contests constituted more than half his taxable income over a four year period. Fine's partial success demonstrates that he already possessed the skills necessary to make a business of contest participation.

In short, there was evidence from which a trier of fact could conclude that Fine did everything reasonably possible to make a business out of contest participation. We conclude that he has established a triable issue of fact whether he was injured in his business and consequently has standing. We therefore turn to the issue of whether the restrictions violate section 1 of the Sherman Act, 15 U.S.C. section 1.

B. Rule of Reason Versus Per Se Analysis

Fine contends that the network-producer agreements restricting non-celebrity appearances constitute a group boycott, a per se violation of section 1 of the Sherman Act.

In so doing, Fine misapprehends the fundamental nature of a group boycott. Even though a boycott can, and often does, span more than a single level, some concerted effort at a single market level -- a horizontal combination or agreement -- is requisite before the type of per se violation commonly termed a "goup boycott" can be found to exist. L. Sullivan Handbook of the Law of Antitrust section 83 (1977); see Cascade Cabinet Co. v. Western Cabinet and Millwork, 710 F.2d 1366, 1370 (9th Cir. 1983); see, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13 (1959)(combination of manufactures, distributors and a retailer to deprive another retailer of opportunity to buy certain appliances); Fashion Originator's Guild of America, Inc. v. F.T.C., 312 U.S. 457 (1941)(agreement by garmentdesigners and manufacturers not to sell to retailers handling garments resulting from "style piracy"). Cases cited by Fine are not to the contrary. See St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531 (1978)(agree-

ment by insurance companies to offer malpractice insurance only on a "claims made" basis); Washington State Bowling Prop. Ass'n v. Pacific Lanes, 356 F.2d 371 (9th Cir.) cert. denied, 384 U.S. 963 (1966)(owners of bowling establishments agreed to restrict tournament and league eligibility to bowlers not frequenting competing establishments); Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971)(challenge to bylaws of association of basketball teams).

In an attempt to show a horizontal agreement Fine construes the restrictions on repeat appearances as consciously parallel. Defendants' evidence, however, explained the development of those restrictions. Network policies designed to insure credibility and integrity were developed after a number of scandals in the 1950s based on allegations of collusion between non-celebrity contestants and producers enabling certain contestants to continue to win. The restrictions were partially designed to prevent some contestants

from gaining an advantage by virtue of familiarity with contest selection and televsion taping procedures. The restrictions also arose from a belief that the audience appeal of game shows is maximized by contest participants perceived as similar to audience members in skills and ability. Networks have received letters form viewers complaining of repeated gameshow appearances by certain individuals. The networks' restrictions vary widely and were adopted independently, at different times. Only two of the producers have such standards. These standards also differ.

The agreements between the networks and producers which Fine alleges violate section 1 are vertical. Even if one assumes that the restrictions on repeat appearances constitute consciously parallel action, such action alone is insufficient to establish a conspiracy. Grandad Bread, Inc. v. Continental Baking Co., 612 F.2d 1105, 1112 (9th Cir. 1979), cert. denied, 449 U.S. 1076 (1981); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors. Ltd.,

416 F.2d 71, 84-85 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970). There is no factual basis for finding a horizontal agreement, combination or conspiracy between networks or between producers.

A per se rule is generally not applied when a concerted refusal to deal is vertical rather than horizontal. Cascade Cabinet Co., 710 F.2d at 1371. In decideing whether to apply a per se rule instead of a rule of reason analysis to conduct outside of a prevously recognized per se catagory, the critical inquiry is whether the "practice facially appears to be one that would almost always tend to restrict competition and decrease output." Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1052 (9th Cir.), cert. denied, ____ U.S. ____, 104 S.CT 156 (1983), quoting Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979). Fine has not shown any general anticompetitive effect by virtue of the challenged rules, despite their effect upon him personally. Even assuming the

requisite anticompetitive effect, we lack the experience with this sort of business relationship which would justify creating a new per se classification. See Cascade Cabinet Co., 710 F.2d at 1372, citing Broadcast Music, Inc., 441 U.S. 1, 9-10.

We proceed, therefore, with a rule of reason analysis.

C. Application of the Rule of Reason

"Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'." Cascade Cabinet Co., 710 F.2d 1373, quoting Norhtrop, 701 F.2d at 1050. To establish a section 1 violation under the rule of reason, a plaintiff must show an agreement which is intended to harm or unreasonably restrain competition and actually does so. Cascade Cabinet Co., 710 F.2d at 1373, citing Reid Brothers Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292 (9th Cir.), cert. denied, ____ U.S.

____ (1983). Plaintiff must show injury to a market or to competition in general, not merely injury to individuals. Cascade Cabinet Co., 710 F.2d at 1373, citing Klamath Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276 (9th Cir.), cert. denied, ____ U.S. ____, 104 S.Ct. 88 (1983).

As previously discussed, there exist valid reasons for the networks' restrictions on repeat appearances. Moreover, Fine has failed to show any general anticompetitive effect caused by the restrictions. The pool of individuals applying to compete is much larger than the number of individuals who can actually be accommodated as contestants. When an experienced contestant is denied an opportunity to compete, an inexperienced applicant is afforded a chance to fill the vacancy. Fine fails to allege or demonstrate the type of injury to the contestant "market" requisite to a rule of reason recovery. Because there are no material issues of fact which have bearing on our rule of reason analysis, summary judgment is affirmed.

AFFIRMED.

FOOTNOTES

1. Because we find that Fine has standing under section 4 of the Clayton Act, and ultimately find the challenged practices lawful, it is unnecessary to decide whether Fine has section 16 standing.

Fine v. Barry and Enright Productions - No. 83-5899

SNEED, Circuit Judge, Concurring in the Result of the Judgement.

The majority reached the correct result in affirming the judgement below.

However, it strayed fron the mark in its disposition of the standing issue. Summary judgment was proper under the circumstances with which the district court was confronted. The legal issue was whether the appellant had engaged in contest participation as a business. That issue can also be characterized as an "ultimate fact", the establishment of which "involve(s) the application of predominately legal standards to undisputed historical facts." See Schwarzer, Summary Judgment Under The Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 472 (1984). As such it is an issue quite suitable for resolution by a court. See, e.g., Parks v. Watson, 716 F.2d 646, 660 (9th Cir. 1983)(in determining standing to assert antitrust claim, lower

court properly held there was no material question of fact in finding that plaintiff;s company had taken insufficient "demonstrable steps" to enter offsite geothermal heat business). The so-called historical facts are not genuinely disputed; what is disputed is the standing of the appellant to assert a cause of action under the Sherman Act. This is an issue of law and policy. Schwarzer, supra, at 472. The district court held the appellant lacked standing while the majority renders an almost delphic judgment. To the majority standing would exist provided either a jury or a judge, acting as a factfinder so concluded. It strongly suggests, however, that a "true" factfinder would find that standing exists.

We should fish or cut bait on the standing issue. Either the district court is right or it is wrong. Additional historical facts would not likely become available even if this case were to be remanded which, of course, it will not be. The majority only has succeeded in unnecessarily reducing the clarity of the

principles of standing. Since it wished to decide the case on the basis of the rule of reason versus per se issue, it should have assumed, without deciding, that the appellant had standing.

For my part I would decide the case on the basis of standing and hold that the district court was right. I would not treat six attempts to compete, of which three were successful, as either sufficient background and experience or the required affirmative action demanded by the four factor analysis of Solinger v. A & M Records, Inc.,586 F.2d 1304, 1309 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979). Moreover, I disagree completely with the majority's conclusion that the district court erred in believing that appellant's "status as a law student, engagement in part time employment and failure to make special efforts to improve contest skills" required the holding that appellant was not in the business of contest participation. Maj. Op. p. 6, lines 14-15. The fact that he was

barred from certain television game shows can not be used to excuse appellant fron demonstrating that his business is contest participation. The game shows are not the only contests in town. To say that he is in the business of competing in game shows becausehe cannot compete in game shows strips the notion of business of its substance and borders on nonsense.

I have no doubt there is a business of contest participation, just as there is a business of gambling; but appellant's activities were no more the business of contest participation than would the playing of slot machines in Nevada every third of fourth weekend be the business of gambling.

I would not reach the rule of reason versus per se analysis issue.

Re: Fine v. Barry & Enright Productions, No. 83-5899

KENNEDY, Circuit Judge, concurring:

I concur.

A company is free, as a general rule, to design its products to its own specifications without facing the charge of a vertical combination in restraint of trade. Nothing more occurred here. The networks, acting independently, decided to produce amatuer game shows, and they were free to so specify to their producers. This is not a vertical conspiracy at all but simply a contract to purchase a specified product from the producers and then market it to a television audience. That, it seems to me, is the heart of the case.

The vertical restraint cases cited in the opinion of the court are ones in which parties on two different market levels agree to exclude a third party who is in horizontal competition with one of them. See Klor's, Inc. v. Braodway-Hale Stores, Inc., 359 U.S. 207,

209 (1959); Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1370-71 (9th Cir. 1983). Those cases seem inapposite because Fine does not compete with the networks or the producers in any respect.

The majority analysis is entirely correct in pointing out that no horizontal agreements are implicated here. The network's policies were lawful and privileged.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN ALLEN FINE Plaintiff, vs. BARRY AND ENRIGHT PRODUCTIONS, GOODSON AND TODMAN PRODUCTIONS, MERRILL HEATTER PRODUCTIONS, NATIONAL BROADCASTING CO., AMERICAN BRAODCASTING CO., CBS, INC. and MERV GRIFFIN PRODUCTIONS, Defendants.	No. CV 82-628-LTL(Gx) STATEMENT OF REASONS

This matter is here following the Court's granting of defendant's motion for summary judgment on April 25, 1983.

Plaintiff Martin Allen Fine appeared on three network-televised game shows between 1978 and 1982. Plaintiff was subsequently disqualified from appearing on a fourth show, Joker's Wild, due to an eligibility rule contained in the contract between the producer of the show, defendant Barry and Enright Productions, and the network televising the show, defendant CBS, Inc.

Thereafter plaintiff filed this antitrust action on February 10, 1982 against the three major television networks and four producers of game show format television programs. Plaintiff alleges that enforcement of the eligibility rules governing appearances on game shows which each network maintains violates Section 1 of the Sherman Act, 15 U.S.C. Section 1. Both monetary damages and injunctive relief were sought.

The threshold issue presented by defendants motion is plaintiff's standing to pursue this suit. Since the motion is one for summary judgment, defendants can prevail only if there is no genuine issue of material fact and defendants are entitled to a judgment as a matter of law. Gaines v. Haughton, 645 F.2d 761, 769-70 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982). All facts and inferences drawn therefrom must be viewed in the light most favorable to plaintiff, and it is defendants who have the burden of establishing the nonexistence of any triable issue of fact. Clip-

per Express v. Rocky Mountain Motor Tariff, 674 F.2d 1252, 1261 (9ht Cir. 1982), modified, 690 F.2d 1240 (9th Cir. 1982), cert. denied, ____ U.S. ____, 103 S.Ct. 1234 (1983).

Section 4 of the Clayton Act

Section 4 of the Clayton Act, 15 U.S.C. Section 15, confers standing to sue for treble damages upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."

The Supreme Court has defined "business or property" as referring to "commercial interests or enterprises." Hawaii v. Standard Oil, 405 U.S. 251, 264 (1972). Subsequent authority, however, would appear to indicate that "commercial interests or enterprises" refers only to the definition of "business" and not to that of "property." See Reiter v. Sonotone Corp., 442 U.S. 330 (1979). A fuller definition of "business" is contained in Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942) (cited with approval in Standard Oil, supra, at 264):

> We assume that the word business was used in its ordinary sense and with its usual connotations. It signifies ordinarily that which habitually busies, or engages, time, attention or labor, as a principal serious concern or interest. In a somewhat more truly economic, legal and industrial sense, it includes that which occupies the time, attention and labor of men for for the purpose of livelihood or profit, -- persistent human efforts which have for their end pecuniary reward. It denotes "the employment or occupation in which a person is engaged to procure a living." Allen v. Commonwealth, 188 Mass. 59, 74 N.E. 287, 288, 69 L.R.A. 599 125 F. 2d, at 419.

Defendants' first argument is that being a game show contestant cannot be a "business" within the meaning of 15 U.S.C. Section 15. In addressing this argument it should be noted

that courts have repeatedly held that the term "business" includes the employment or occupation by which an individual earns his living. See Von Kalinowski, Antitrust Laws and Trade Regulation, Vol. 13, Section 101.02(1), p. 101-5, and cases cited at n.4; Quinones v. Nat. Ass'n of Securities Dealers, Inc., 540 F.2d 824, 829-30 (5th Cir. 1976); Nichols v. Spencer International Press, Inc., 371 F.2d 332, 334-35 (7rh Cir. 1967). Moreover, the Supreme Court has liberally applied Section 4 of the Clayton Act "in accordance with its plain language and its broad remedial and deterrent objectives." See Blue Cross of Virginia v. McCready, ___ U.S. ___, 102 S.Ct. 2540, 50 U.S.L.W. 4723, 4724-25 (1982). Thus, artificial limitations should not be engrafted on the Section 4 remedy. Id.

While being a game show contestant is not an ordinary occupation, in the absence of defendant networks' policies there is no reason why a person could not make a living out of being a game show contestant. The occupa-

tion would appear to be a cross between an actor and a tournament athlete. Thus, plaintiff could concentrate upon developing his characteristics and attributes in such a manner as to become a desirable game show contestant, much in the same manner as an actor develops himself. Such development would presumably enhance plaintiff's chances of being selected as a contestant, since defendants admittedly look for certain characteristics in potential game show contestants. Plaintiff could also concentrate upon studying facts and topics the knowledge of which might enable him to do better on the game show he is selected for, just as a tournament tennis player, for example, hones his skills. It would also seem that the contingent nature of a successful applicant's compensation is not inconsistent with the notion of engaging in the business of being a game show contestant since, of course, the compensation of a tennis player (in the old days, at least) might also be strictly contingent upon performance.

Defendants' second argument is that, even if being a game show contestant can be considered to be a "business," plaintiff is not engaged in that "business." In this regard defendants point out that plaintiff has applied for only six game shows over the past four years, that plaintiff has made no special efforts to prepare for his appearances on game shows or to make himself a more desirable contestant, that plaintiff has been a law student on and off for the past four years and intends to become an attorney, and that plaintiff has held several other part- and full-time jobs over the past four years. Plaintiff, on the other hand, argues that his major source of income over the past four years has been his appearances on game shows.

It should first be noted that it is not required that plaintiff have a going business in order to be injured in his "business" by antitrust violations. Hayes v. Solomon, 597 F.2d 958, 973 (5th Cir. 1979), cert. denied, 444 U.S. 1078 (1980); Huron Valley Hospital,

Inc., v. City of Pontiac, 666 F.2d 1029, 1033 (6th Cir. 1981). Recovery can be had for a wrongfully frustrated attempt to enter a business. Id. Such an attempt is established by showing (1) an intention to enter the business, and (2) preparedness to enter the business. Id. Factors relevant to a determination of preparedness include plaintiff's financial ability to enter the business, and plaintiff's background and experience in the prospective business. Solinger v. A & M Records, Inc., 586 F.2d 1304, 1309-10 (9th Cir. 1978), cert. denied, 441 U.S. 908 (1979); Martin v. Phillips Petroleum Company, 365 F.2d 629, 633-35 (5th Cir.), cert. denied, 385 U.S. 991 (1966). This determination is a factual one "and seldom presents a situation appropriate for a determination by summary judgment." Solinger, supra, at 1310.

This situation, however, is appropriate for summary judgment. Upon the record before the court, defendants have conclusively established that plaintiff neither entered the game

contestant business nor was wrongfully frustrated in a sufficient attempt to enter such a business. The only facts plaintiff points to are six applications over a four year period and the winning of a substantial amount of money. This evidence is insufficient to create a material issue of fact, since it does nothing more than place plaintiff in the same position as a person who occasionally visits Las Vegas and happens to win. No commitment to the "business" is shown -- plaintiff has in no way made any special efforts to improve any skills that might be required of a game show contestant, nor has he regularly attempted to practice the business. Indeed, the record of plaintiff's "principal serious concern or interest" has been the study of law. It is to that pursuit that plaintiff has devoted his "time, attention and labor ... for the purpose of livelihood or profit." It is an attorney that plaintiff seeks to become -- not a game show contestant.

The court recognizes that a person may

be engaged in more than one "business" at a time, and thus that plaintiff's business as a law student is not necessarily inconsistent with plaintiff having an occupation as a game show contestant at the same time. However, the facts on record fail to demonstrate any significant expenditure of time or effort by plaintiff on activities related to being a game show contestant. Moreover, plaintiff has held a series of part- and full-time jobs over the past four years which have occupied the bulk of plaintiff's working time. To the extent that plaintiff might have had "principal serious concern(s) or interest(s)" apart from the study of law, those interests would be in the jobs plaintiff regularly performed and solicited while in law school.

Having concluded that no material issue of fact exists as to whether plaintiff has been injured in his "business," the court next addresses the question of whether plaintiff has been injued in his "property." The Supreme Court has stated that "the word

property has a naturally broad and inclusive meaning. In its dictionary definitions and in common usuage propertycomprehends anything of material value owned or possessed. See, e.g., Webster's Third International Dictionary 1818 (1961). Money, of course, is a form of property." Reiter, supra, at 338. Thus, a consumer forced to pay higher prices as a result of an antitrust violation is injured in her property.

Property has alternately been described as those things which are "deserving of legal protection." Phillips Petroleum Company, supra, at 634. Thus, a loan application to a bank does not qualify as property, since no contractual obligation from which legal rights and duties might flow, a party has no property arising out of his dealings with another party. Id.

No issue of fact exists as to the existance of any "property" belonging to plaintiff which might have been injured as a result of the alleged antitrust violations. Although

plaintiff was rejected from a game show subsequent to being selected as a contestant because of the eligibility policy, since plaintiff had no contractual or legal right to appear on the game show he is no different from the plaintiff in Phillips Petroleum Company who had his loan application turned down. Plaintiff's inchoate relationship cannot constitute property.

Plaintiff also cites the loss of his "opportunity" to earn future income. This argument, however, has implicitly been answered in the court's discussion of whether plaintiff has a business interest in this case. The "opportunity" to earn income is not a protectible interest for "the inchoate business enterprise with a mere hope of entry," but only the "serious potential" entrant who has taken sufficient preparatory steps. Huron Valley Hospital, Inc., supra, at 1033. Since, as a matter of law, plaintiff is not a "serious potential" entrant to the business of being a game show contestant,

his "opportunity" to earn furure income does not constitute property. Accordingly, plaintiff being injured in neither his business nor his property, plaintiff lacks standing under Section 4 of the Clayton Act to sue for treble damages.

Section 16 of the Clayton Act

Although neither plaintiff nor defendants addressed the question of standing under Section 16 of the Clayton Act, 15 U.S.C. Section 26, both plaintiff's complaint and plaintiff's motion for partial summary judgment sought injunctive relief. 15 U.S.C. Section 26 provides, in pertinent part, that:

> Any person ... shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws ... when and under the same conditions and principle as injunctive relief against threatened conduct that will cause loss or damage is

granted by courts of equity ...

This section varies significantly from Section 4 in that there is no "business or property" requirement. In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 130 (9th Cir. 1973), cert. denied, 414 U.S. 1148 (1974). Since defendants are not exposed to the potentially disastrous treble damages judgments available under Section 4, courts do not exercise the same pronounced restraint in granting standing to Section 16 plaintiffs as they do before granting Section 4 standing. Id. In order to obtain standing, plaintiff "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." Zenith Radio Corp. v. Hazeltine Reasearch, Inc., 395 U.S. 100, 130 (1969). Restated, plaintiff must establish "(1) a threatened loss or injury cognizable in equity (2) proximately resulting from the alleged antitrust violations." City of Rohnert Park v. Harris, 601 F.2d 1040,

1044 (9th Cir. 1979), cert. denied, 445 U.S. 961 (1980).

It should be noted that plaintiff's rejection from a game show subsequent to his being accepted as a contestant cannot constitute the "threatened loss or damage" necessary to confer standing, since it occurred in the past. In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 234 (9th Cir. 1976).

The only loss or damage that plaintiff can assert is his inability to apply for network game shows without being disqualified because of the eligibility policies. This loss is purely speculative in that, absent the alleged antitrust violations by appellees, plaintiff has failed to make any showing that he would have been selected for other game shows. See City of Rohnert Park, supra, at 1044-45. Moreover, no showing has been made that plaintiff would have won money in any such game for which he was selected. It would appear that plaintiff's "track" record is insufficient for either of these purposes, given the

acknowledged difficulty in being selected for game shows. Accordingly, since plaintiff cannot demonstrate any significant threats of injury, palintiff lacks standing under Section 16 of the Clayton Act.

Conclusion

Since plaintiff has not been injured in his "business or property" within the meaning of Section 4 of the Clayton Act, and since plaintiff cannot establish a "significant threat of injury" sufficient to confer standing upon plaintiff under Section 16 of the Clayton Act, plaintiff lacks standing to sue under the antitrust laws. Defendants are accordingly entitled, as a matter of law, to judgment in their favor.

The Clerk of the Court will serve copies of this Statement of Reasons by United States mail upon counsel of record.

Dated: This 11th day of May, 1983.

Lawrence T. Lydick
United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN ALLEN FINE, Plaintiff, vs. BARRY AND ENRIGHT PRODUCTIONS, GOODSON AND TODMAN PRODUCTIONS, MERRILL HEATTER PRODUCTIONS, NATIONAL BROADCASTING CO., AMERICAN BROADCASTING CO., CBS, INC., and MERV GRIFFIN PRODUCTIONS, Defendants.	No. CV 82-628-LTL (Gx) J U D G - M E N T

Upon a hearing in open court, the Honorable Lawrence T. Lydick, District Judge, presiding, on the motion of defendants for summary judgment in their favor on the second amended complaint, said motion having been brought pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Court having reviewed the record of the case, the memoranda, declarations and exhibits on file herewith, having heard the arguments of counsel, and being fully advised on the premises, and for those reasons contained in the Statement of

Reasons filed herewith, it is hereby,

ORDERED, ADJUDGED, and DECREED that defendant's motion for summary judgment be, and the same hereby is, granted. It is

FURTHER ORDERED, ADJUDGED, and DECREED that plaintiff's second amended complaint, together with each of his prior complaints, be dismissed and that defendants recover from plaintiff the sum of $_____ in costs and disbursements as taxed.

Dated: This 11th day of May, 1983.

_____
Lawrence T. Lydick
United States District Judge

UNITED STATESCOURT OF APPEALS

FOR THE NINTH CIRCUIT

MARTIN ALLEN FINE, Plaintiff-Appellant, v. BARRY AND ENRIGHT PRODUCTIONS, GOODSON-TODMAN PRODUCTIONS, MERRILL HEATTER PRODUCTIONS, INCORPORATED, NATIONAL BROADCASTING COMPANY, INCORPORATED, AMERICAN BRAODCASTING COMPANIES, CBS INCORPORATED, MERV GRIFFIN PRODUCTIONS, Defendants-Appellees.	)	No. 83-5899 O R D E R

Before: SNEED, KENNEDY, and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and

the suggestion for a rehearing is rejected.

FILED: June 22, 1984

Phillip B. Winberry

Clerk, U.S. Court of Appeals

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MARTIN ALLEN FINE	)	No. CV 82-626-LTL
vs	)	
BARRY & ENRIGHT PRODUCTIONS, et al.	)	FILING AND SPREADING MANDATE FROM THE 9TH CIRCUIT COURT OF APPEALS

IT IS SO ORDERED that the judgment filed and entered in the Ninth Circuit Court of Appeals on April 25, 1984 and lodged in this U.S. District Court on July 6, 1984 affirming the decision of this U.S. District Court is hereby filed and spread upon the minutes of this Court.

Office-Supreme Court, U.S.
FILED
SEP 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-93

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MARTIN ALLEN FINE,

Petitioner,

v.

BARRY AND ENRIGHT PRODUCTIONS,
GOODSON-TODMAN PRODUCTIONS,
MERRILL HEATTER PRODUCTIONS, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC., and MERV GRIFFIN PRODUCTIONS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

ANDREW M. WHITE, P.C.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
2049 Century Park East
Los Angeles, California 90067
(213) 556-8000

Attorneys for Respondent American Broadcasting Companies, Inc.

Of Counsel:

GEORGE MIRON, P.C.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 466-2222

[List of Attorneys continued on inside cover]

PANDICK PRESS, WASHINGTON—1801 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-6000

BEST AVAILABLE COPY

ROBERT M. NAU
RICHARD E. ROBINSON
SILVERBERG, ROSEN, LEON & BEHR
2029 Century Park East, Suite 1900
Los Angeles, California 90067-3088
(213) 277-4500
Attorneys for Respondent
Barry & Enright Productions

EDWARD M. ROSENFELD
COVERT E. PARNELL, III
ROSENFELD, PARNELL & SHAMES
1875 Century Park East, Suite 950
Los Angeles, California 90067-3088
(213) 557-1000
Attorneys for Respondents
Goodson-Todman Productions and
Merv Griffin Productions

JACK D. SAMUELS
SAMUELS & WEINER
2029 Century Park East, Suite 2790
Los Angeles, California 90067
(213) 201-0101
Attorneys for Respondent
Merrill Heatter Productions

J. EDD STEPP, JR.
W. RUEL WALKER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

and

DONALD L. ZACHARY
TRACY S. RICH
ROBERT MENDEZ
National Broadcasting Co., Inc.
3000 West Alameda Avenue
Burbank, California 91523
(818) 840-3508

Attorneys for Respondent
National Broadcasting Company, Inc.

HERBERT M. SCHOENBERG
IRA L. KURGAN
CBS Inc.
7800 Beverly Boulevard
Los Angeles, California 90036
(213) 852-2707
Attorneys for Respondent
CBS Inc.

September 14, 1984

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	2
SUMMARY OF ARGUMENT	5
ARGUMENT	5
I. Summary Judgment Is Proper In Antitrust Action	5
II. The Specification Of Contestant Eligibility In A Contract To Purchase A Television Game Show Is Not A Conspiracy In Violation Of The Sherman Act	5
A. A Contestant Eligibility Specification Is Not A Boycott	5
B. The Contestant Eligibility Specifications Are Not Unreasonable Restraints Of Trade	7
C. The Adoption Of Eligibility Criteria Does Not Constitute Parallelism That Proves A Conspiracy	8
CONCLUSION	9

TABLE OF AUTHORITIES

	Page
CASES:	
Associated Press v. *United States*, 326 U.S. 1 (1945)	6
Board of Regents of the University of Oklahoma v. *Nation Collegiate Athletic Ass'n.* ____U.S.____, 104 S.Ct. 2948 (1984)	7
Broadcast Music Inc. v. *CBS, Inc.* 441 U.S. 1 (1979)	7
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	7
Continental TV, Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977)	6,7
Copperweld Corp v. *Independence Tube Corp.*, ____U.S. ____, 104 S.Ct. 2731 (1984)	7
Fashion Originators' Guild of America v. *FTC*, 312 U.S. 468 (1941)	6
First Nat. Bank v. *Cities Service Co.*, 391 U.S. 253, *reh. denied*, 393 U.S. 901 (1968)	5,8
Grandad Bread, Inc. v. *Continental Baking Co.*, 612 F.2d 1105, 1112 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981)	8
Jefferson Parish Hosp. Dist. No. 2 v. *Hyde*, ____U.S.____ , 104 S.Ct. 1551, (1984)	7
Joseph E. Seagram & Sons, Inc., v. *Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970)	8
Klor's, Inc. v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)	6
Parsons v. *Ford Motor Co.*, 669 F.2d 308 (5th Cir.) *cert. denied*, 103 S.Ct. 73 (1982)	5
Poller v. *CBS, Inc.*, 368 U.S. 464 (1962)	
Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (per curiam)	6
Ron Tonkin Gran Turismo, Inc. v. *Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981), *cert. denied*, 454 U.S. 831 (1982)	5
Silver v. *New York Stock Exchange*, 373 U.S. 341 (1963)	7
Standard Oil of California v. *United States*, 337 U.S. 293 (1949)	6

	Page
Tampa Electric Co. v. *Nashville Coal Co.*, 365 U.S. 320 (1961)	6
Theatre Enterprises v. *Paramount Distrib. Corp.*, 346 U.S. 537 (1954)	8
United States v. *Terminal R.R. Ass'n.*, 224 U.S. 383 (1912)	6
White v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982)	5
STATUTES:	
15 U.S.C. § 15	4
47 U.S.C. § 508	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-93

MARTIN ALLEN FINE,

Petitioner,

v.

BARRY AND ENRIGHT PRODUCTIONS,
GOODSON-TODMAN PRODUCTIONS,
MERRILL HEATTER PRODUCTIONS, INC.,
NATIONAL BROADCASTING COMPANY, INC.,
AMERICAN BROADCASTING COMPANIES, INC.,
CBS INC., and MERV GRIFFIN PRODUCTIONS,

Respondents.

BRIEF IN OPPOSITION

QUESTION PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit erred in deciding that petitioner failed to offer any evidence tending to prove that his inability to participate in respondents' television game show programs resulted from a conspiracy among respondents in violation of the Sherman Act.

STATEMENT

Petitioner Martin Allen Fine claims that he was excluded from appearing as a contestant on respondents' televised game shows by reason of a conspiracy among respondents. Three respondents—American Broadcasting Companies, Inc. ("ABC"), CBS Inc. ("CBS"), and National Broadcasting Company, Inc. ("NBC")—televise games shows. The other four respondents are independent producers of game shows.

The theme of each of the game shows in question is a contest in which a non-expert drawn from the populace competes against another non-expert, or against a celebrity who is also not an expert in the subject matter of the contest. This theme is based on the belief that many home viewers derive enjoyment in playing the game while watching the program and comparing themselves to the contestants. The concept of the non-expert contest is the antithesis of the televised quiz shows of the 1950's that directed questions to persons known to have extensive knowledge of certain subjects (such as opera or sports), where correct answers would display great erudition. The scandal that ensued upon discovery that some of those programs were rigged led to Congressional investigations, the cancellation of programs, and the enactment of a federal statute prohibiting the rigging of game shows. 47 USC § 508 (formerly § 509).

In the wake of the quiz show scandals in the 1950's, each network adopted a strict policy designed to insure the integrity of its game shows. The policy of each provided better measures to insure that contestants did not learn the questions and answers in advance of the contests, stricter rules for interaction between celebrity and non-celebrity contestants, and restrictions declaring the ineligibility of certain classes of persons to be accepted as non-celebrities, *e.g.*, persons affiliated with the show's producer or broadcaster, and professional entertainers. *CR* 103, ¶ 7, 8; *CR* 104, ¶10.[1] With these measures in place, the networks resumed the broadcasting of game shows.

---

[1] "CR" refers to the District Court Clerk's Record.

After the new game shows appeared, each network became aware, from complaining letters and telephone calls of viewers, that some persons were appearing repeatedly as contestants on numerous game shows, thereby raising, in the viewers' minds, questions as to the *bona fides* of the contests. Each network realized that additional safeguards were required, and each adopted a policy designed to protect the amateurism and spontaneity that are essential parts of the themes of their shows, as well as to protect themselves from collusion between contestants and disloyal employees.

NBC adopted its policy in the early 1960's (*CR* 104, ¶ 9); ABC adopted its policy in the mid-1960's (*CR*, 103 ¶¶ 9, 12), and CBS adopted its policy in 1972 (*CR*, 105, ¶ 6). Each has modified its policy from time to time (*CR*, 104, ¶ 9, *CR* 103, ¶¶ 9, 12, *CR* 105, ¶ 6). At various later times, some of the respondents that are game show producers adopted their own game show eligibility criteria (*CR* 103, ¶¶ 4, 6; *CR*, 103, ¶ 4).

The criteria of all respondents seek the same results—*i.e.*, to maximize program spontaneity and to minimize the danger of rigging—but the criteria differ in detail. For example, ABC limits any non-celebrity to one appearance in twelve months and two appearances in five years (*CR*, 193 ¶¶ 9, 12), while CBS limits any person to one appearance in twelve months and twice in a lifetime (*CR*, 105, ¶ 6).

Petitioner came upon the scene while a law student at Pepperdine University. In July 1978 he competed on "Tic Tac Dough," winning $5,393 in cash and prizes. (Supp. Ans. No. 38.)[2] In November 1980 he won $5,682.85 in cash and prizes on "Password Plus." *Id.* In January 1982 he was awarded $211.45 in prizes on "Blockbusters." *Id.* His application to appear on "Joker's Wild" was accepted in January 1982, but he was disqualified before appearing on the show when its producer learned that, by reason of petitioner's prior game show appearances, he did not meet that producer's eligibility criteria. (Petitioner's depo. pp. 170-172; 174-180, 465-468; petitioner's

[2] Reference to "Int. Ans." and "Supp. Ans." refer to petitioner's Answers to Interrogatories and petitioner's Supplemental Answers to Interrogatories, respectively, lodged with the District Court.

depo. ex. no. '5; Int. Ans. 36, 37.)[3] In February 1982 petitioner applied, but was not selected, to appear on "Battlestars." (Supp. Ans. No. 35.)

On February 10, 1982, petitioner filed a complaint in the United States District Court in Los Angeles, alleging that his inability to appear more frequently on televised game shows resulted from an illegal conspiracy among defendants.

Petitioner offered no evidence of a conspiracy among the three networks, or among the four independent producers of game shows. The only agreements of any kind he pointed to as supporting his claim of unlawful conspiracy are the individual contracts between networks and their game show suppliers regarding the production of particular shows. Each contract includes a promise of the supplier to adhere to the purchaser's eligibility criteria in recruiting persons for appearances on the show.

Petitioner also claimed that a conspiracy could be inferred from conscious parallel action of the respondents, but offered no evidence of parallelism other than the fact that most respondents employed eligibility policies that were similar in objective.

The District Court granted respondents' motion for summary judgment on the ground that petitioner could not show injury to his business or property as provided by section 4 of the Sherman Act. 15 U.S.C. §15. The Court of Appeals affirmed on the ground that the undisputed facts showed that there was no conspiracy in violation of the Sherman Act.

In affirming the District Court the majority of the Court of Appeals held that petitioner had not offered any evidence of an unlawful conspiracy. The third member concurred in the result on the ground that petitioner had proved no injury to business or property within the meaning of section 4 of the Sherman Act.

---

[3] References to "Petitioner's depo. _____" are to pages of the transcript of petitioner's deposition, and references to "Petitioner's depo. ex. no. _____" are to exhibits attached to that transcript, lodged with the District Court.

SUMMARY OF ARGUMENT

This Court should not grant certiorari because the Court of Appeals correctly decided that petitioner did not offer any evidence tending to show a conspiracy to exclude petitioner as a television game show contestant.

ARGUMENT

1. Summary Judgment Is Proper In Antitrust Actions

Although summary judgment is to be granted cautiously in antitrust cases, *Poller* v. *CBS, Inc.*, 368 U.S. 464 (1962), it is nonetheless appropriate when a plaintiff offers no evidence to rebut averments in defendants' affidavits showing that no conspiracy occurred, or to rebut averments that the alleged restraint has no anticompetitive purpose of effect. *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-90 *reh. denied*, 393 U.S. 901 (1968); *Ron Tonkin Gran Turismo, Inc.*, v. *Fiat Distributors, Inc.*, 637 F.2d 1376, 1381 (9th Cir. 1981), *cert. denied*, 454 U.S. 831 (1982); *Parsons* v. *Ford Motor Co.*, 669 F.2d 308 (5th Cir.), 103 S.Ct. 73 (1982); *White* v. *Hearst Corp.*, 669 F.2d 14 (1st Cir. 1982).

2. The Specification Of Contestant Eligibility Criteria In A Contract To Purchase A Television Game Show Is Not A Conspiracy In Violation Of The Sherman Act.

A. *A Contestant Eligibility Specification Is Not A Boycott.*

A network's purchase of a game show is the acquisition of a business-producing asset. The network specifies the characteristics to serve its needs. In the case here, the need of each network is for game shows that feature an ever-fresh supply of non-experts drawn from all walks of life, and that are not only free from collusion but also free from any appearance of collusion. The eligibility rules constitute the purchaser's specification to aid in obtaining shows with those characteristics. The notion that such specifications constitutes a boycott has no support in case law.

The specification of eligibility criteria is not a boycott because it is not an agreement among competitors, but a vertical agreement between purchaser and supplier. While in common parlance almost any agreement of two persons that results in their not dealing with a third is sometimes called a boycott, this Court has never condemned such an agreement unless at least two of the agreeing parties are competitors of one another. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207, 212-13 (1959); *Fashion Originators' Guild of America* v. *FTC,* 312 U.S. 468 (1941). In *Klor's,* as in *FOGA,* the conspirators included competing manufacturers. It would have been untenable to relieve the competing manufacturers of liability for conspiracy simply because persons at other levels of distribution also participated in the conspiracies.

Moreover, the necessity in boycott jurisprudence of proving that at least two of the conspirators are competitors is not mere formalism. Boycotts are illegal *per se. Klor's, Inc.,* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961) (per curiam). If all it took to prove a boycott was to show a refusal of any two persons to deal with a third, then every exclusive requirements contract would be a boycott, an untenable result in light of the long-established rule that such contracts are judged by the rule of reason. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320 (1961); *Standard Oil Co. of California* v. *United States,* 337 U.S. 293 (1949). For the same reason, vertical territorial allocations would be classified as boycotts, in contravention of the holding of *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36 (1977), that such allocations are governed by the rule of reason.

A second reason why the eligibility criteria in a contract to purchase a program are not a boycott is that every agreement to refuse to deal, even if among competitors, is judged by the rule of reason if the refusal is not for an anticompetitive purpose. Thus, joint ventures of competitors may not exclude others for anticompetitive reasons, *Associated Press* v. *United States,* 326 U.S. 1 (1945), but can exclude those who will not assume their aliquot shares of the burdens. *United States* v. *Terminal R.R. Ass'n.,* 224 U.S. 383, 411 (1912). (Those seeking to use

defendants' rail bridge must assume their shares of the costs.) *See also Silver* v. *New York Stock Exchange,* 373 U.S. 341, 348-49 (1963) "[A]bsent any justification derived from the policy of another statute or otherwise" exclusion from the benefits of a stock exchange would violate the Sherman Act.) Thus, if the purpose is not to restrict competition, then the refusal to deal is not classified as a boycott and is judged by the rule of reason.

In this regard, the Ninth Circuit court below accepted respondents' proof of the legitimate purpose of the eligibility criteria, a conclusion that is not surprising in light of the fact that petitioner offered no evidence whatever to contradict respondents' proof. Hence, there is nothing to support the claim that the refusals to accept petitioner as a contestant should be classified as a boycott.

B. *The Contestant Eligibility Specifications Are Not Unreasonable Restraints Of Trade.*

Petitioner offered no evidence that came close to meeting the standard of proof for showing an unreasonable restraint. There was no evidence that the eligibility criteria were for an anticompetitive purpose, and no evidence that the criteria had or could have any effect on pricing, output or otherwise on competition in any market. All that plaintiff could show was the effect of the criteria on him. That, however does not satisfy the test. The antitrust laws protect competition, not competitors. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 320 (1962); *Copperweld Corp.* v. *Independence Tube Corp.,* ____ U.S.____, 104 S.Ct. 2731, 2740 n.14 (1984), and contractual restraints that exclude some persons but do not restrict price competition or limit output are not unreasonable. *Continental TV, Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 54-56 (1977); *Broadcast Music Inc.* v. *CBS, Inc.,* 441 U.S. 1, 19-20, 23 (1979); *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde,* ____U.S. ____, 104 S.Ct. 1551, 1568 (1984). *See also Board of Regents of the University of Oklahoma* v. *National Collegiate Athletic Ass'n,* ____U.S.____, 104 S.Ct. 2948, 2960-62 (1984).

C. *The Adoption Of Eligibility Criteria Does Not Constitute Conscious Parallelism That Proves A Conspiracy.*

The fact that two or more persons in the same trade take similar action proves nothing about conspiracy where each has a problem for which the same solution is indicated. For example, policies of life insurance companies routinely refuse coverage for suicides; new automobile warranties routinely have time and use limits (12,000 miles or one year, whichever comes first); television stations commonly refuse to show X-rated films; rental car companies refuse to rent cars to minors; banks refuse to lend to persons who are not creditworthy and who can offer no collateral.

Respondents gave copious evidence that their adoption of eligibility rules was intended to solve a common problem in the televising of game shows, and petitioner offered no evidence to rebut the proof that there was such a problem or to rebut the proof that the purpose of adopting eligibility criteria was to solve the problem. Petitioner has therefore fallen far short of the threshhold of proof of a conspiracy by proof of conscious parallelism.

This Court has stated that "conscious parallelism has not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises* v. *Paramount Distrib. Corp.*, 346 U.S. 537, 540-41 (1954). In applying that rule, *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 284-290 (1968), upheld the grant of summary judgment for defendant Cities Service Co. against a claim of conscious parallelism. The only evidence of "conspiracy" by Cities Service Co. was that it, like other defendants, failed to agree to purchase Iranian oil from the plaintiff. *See also, Grandad Bread, Inc.* v. *Continental Baking Co.*, 612 F.2d 1105, 1112 (9th Cir. 1979), *cert. denied*, 449 U.S. 1076 (1981); *Joseph E. Seagram & Sons, Inc.*, v. *Hawaiian Oke & Liquors Ltd.*, 416 F.2d 71, 84-85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

In sum, petitioner has not shown conspiracy by direct evidence, by conscious parallelism or otherwise, and has not shown that respondents' eligibility criteria were anticompetitive in purpose or effect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW M. WHITE, P.C.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
2049 Century Park East
Los Angeles, California 90067
(213) 556-8000
Attorneys for Respondent
American Broadcasting
Companies, Inc.

Of Counsel:

GEORGE MIRON, P.C.
WYMAN, BAUTZER, ROTHMAN,
KUCHEL & SILBERT
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037
(202) 466-2222

ROBERT M. NAU
RICHARD E. ROBINSON
SILVERBERG, ROSEN, LEON & BEHR
2029 Century Park East, Suite 1900
Los Angeles, California 90067-3088
(213) 277-4500
Attorneys for Respondent
Barry & Enright Productions

EDWARD M. ROSENFELD
COVERT E. PARNELL, III
ROSENFELD, PARNELL & SHAMES
1875 Century Park East, Suite 950
Los Angeles, California 90067-3088
(213) 557-1000
Attorneys for Respondents
Goodson-Todman Productions and
Merv Griffin Productions

JACK D. SAMUELS
SAMUELS & WEINER
2029 Century Park East, Suite 2790
Los Angeles, California 90067
(213) 201-0101
Attorneys for Respondent
Merrill Heatter Productions

J. EDD STEPP, JR.
W. RUEL WALKER
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
(213) 229-7000

and

DONALD L. ZACHARY
TRACY S. RICH
ROBERT MENDEZ
National Broadcasting Co., Inc.
3000 West Alameda Avenue
Burbank, California 91523
(818) 840-3508
Attorneys for Respondent
National Broadcasting Company, Inc.

HERBERT M. SCHOENBERG
IRA L. KURGAN
CBS Inc.
7800 Beverly Boulevard
Los Angeles, California 90036
(213) 852-2707
Attorneys for Respondent
CBS Inc.

September 14, 1984